Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

No. 624

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

SEARS, ROEBUCK AND CO.,
a New York corporation,
Petitioner,

vs.

RICHARD F. GUGEL, SR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BURTON Y. WEITZENFELD
120 South La Salle Street
Chicago 3, Illinois
Attorney for Petitioner

LOUIS A. LEHR, JR.
LLOYD S. KUPFERBERG
120 South La Salle Street
Chicago 3, Illinois
Of Counsel

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on August 31, 1962.

CITATION TO OPINION BELOW.

The opinion of the Court below may be found in 308 F. 2d 131.

JURISDICTION.

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 31, 1962, and a timely petition for rehearing was denied by that Court on November 2, 1962. This Court has jurisdiction to review the judgment below by writ of certiorari under the provisions of Title 28, U.S.C., Section 1254(1).

QUESTIONS PRESENTED.

1. Did the Court of Appeals substitute its judgment for the law as announced by the Supreme Court of Michigan in ruling on the question of plaintiff's contributory negligence and thus, decide an important state question in a way in conflict with applicable state law?

2. Did the Court of Appeals substitute its judgment for the law as announced by the Supreme Court of Michigan in ruling on the question of defendant's negligence in failing to protect and adequately lights its grease pit, and thus decide an important state question in a way in conflict with applicable state law?

3. Did the court below depart from usual and accepted course of judicial proceedings by failing to consider whether or not the defendant's alleged negligence in failing to properly light the grease pit was the proximate cause of the plaintiff's injury?

STATUTES INVOLVED.

No constitutional provisions, treaties, statutes, ordinances, or regulations are involved.

STATEMENT OF THE CASE.

Plaintiff, Richard F. Gugel, Sr., a resident of Michigan, sued defendant, Sears, Roebuck and Co., a New York corporation, whose principal place of business is Illinois, in the Circuit Court of Saginaw County, Michigan, for personal injuries received from an alleged fall into a grease pit in the service station of defendant's retail store in Saginaw, Michigan. The jurisdictional amount being present, defendant removed the case to the U.S. District

Court for the Eastern District of Michigan, Northern Division. The relevant facts are as follows:

In connection with its retail operation defendant operated a service garage in which there were four pits for servicing and greasing cars (App. 17a, 18a). Each pit was approximately 16 feet long and 3½ feet wide (App. 19a). In addition to lights suspended from the ceiling, each pit was lit from within by several 150-watt bulbs (App. 50a-54a, 99a, 100a). Around the edge of each pit was a ¼ inch steel guard rail 4 inches high which was painted red on the inside and outside. (App. 32a).

On January 24, 1959, between 1:00 and 2:00 in the afternoon, plaintiff entered the service garage and talked to the service manager, Mr. Buckingham. He was advised that as soon as a mechanic, James Dorr, who was working on the car located over pit number 1 had finished, he would assist plaintiff to start his car which was parked outside (App. 71a).

Prior to falling into pit number 1, plaintiff followed Mr. Buckingham between the ends of pits 1 and 3, turned to the north between pits 1 and 2 and walked along the side of pit 1 to the front of the car on that pit. Plaintiff was introduced to the mechanic, Mr. Dorr, and arrangements were made for assisting plaintiff (App. 24a, 27a, 72a). (See also Plaintiff's Exhibit No. 1, App. 114a) The plaintiff then remained next to pit 1 for ten or fifteen minutes (App. 72a, 73a, 29a, 30a), during which time he engaged in conversation with the owner of the car on that pit (App. 27a, 73a). Then plaintiff and Mr. Dorr walked south between pits 1 and 2 along the entire length of pit 1. (App. 74a, 81a, 82a). The mechanic, Dorr, who was ahead of plaintiff, turned right at the south end of pit 1 (App. 41a). John LaDronka, a witness, said that

just prior to the fall, he saw plaintiff stub his toe on the guard rail or flange on the corner of pit 1 (App. 86a, 87a, 92a). Plaintiff's vision was normal (App. 77a) and just prior to his fall, plaintiff testified he saw the grease pit he fell into, knew it was there, knew he was walking along beside it and saw the little ridge around the pit. He further testified that he fell into the pit but that he did not know what happened (App. 79a-82a inclusive).

The theory of plaintiff's case was that defendant was negligent in, 1) failing to provide adequate lighting, 2) failing to provide adequate protective devices around the grease pits to prevent plaintiff from falling in, and 3) leading plaintiff along an unsafe path. Defendant denied any negligence and raised the affirmative defense of contributory negligence.

On March 30, 1961, there was a judgment entered on a verdict for the plaintiff in the amount of $7,850.00. Defendant appealed to the United States Court of Appeals for the Sixth Circuit asking for a reversal. A new trial was not requested.

The Court of Appeals rejected plaintiff's charge of negligence based on an unsafe path but affirmed the judgment on August 31, 1962, with a dissenting opinion by Chief Judge Miller. Defendant petitioned for a rehearing which was denied on November 2, 1962. Judge Miller was of the opinion that the petition for rehearing should have been sustained.

ARGUMENT FOR ALLOWANCE OF WRIT.

1. Summary of Argument.

In the Court of Appeals all three judges agreed that under the Michigan cases having similar factual situations, the plaintiff, Richard F. Gugel, Sr., was contributorily negligent as a matter of law. However, the majority of the Court disregarded its own prior decisions and the decisions of this Court and refused to follow the "last word" of the Supreme Court of Michigan as set forth in those cases. Instead, the majority of the Court exercised its independent judgment and on the basis of abstract principles drawn from cases not in point decided that there was a jury question presented as to plaintiff's contributory negligence.

By its decision the Court of Appeals, contrary to the law of Michigan and on the basis of cases having materially different factual situations, has held that a man with normal eyesight may recover damages when for some reason unknown to himself he falls into a service garage grease pit which, prior to the fall, he stood next to for ten to fifteen minutes and which just prior to the fall he was walking along side of, knew was there and admitted that he saw. The Chief Judge of the Court in his dissenting opinion held that under the applicable Michigan cases, plaintiff was guilty of contributory negligence as a matter of law.

The Court of Appeals also failed to follow the latest Michigan cases in point which hold that there is no jury question presented on the failure to provide protective devices and inadequate lighting under the facts present in the instant case. Since plaintiff admitted he could see

the pit he fell in and the rim around it, the Court also failed to properly consider how the alleged inadequate lighting could have been the proximate cause of plaintiff's fall.

2. Under Michigan Law Plaintiff Was Guilty of Contributory Negligence as a Matter of Law.

Under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188 (1938) the federal court must follow the law of a state as declared by its highest court in a decision. In making this determination the federal court is bound by the state decisions having similar factual situations and must apply those decisions to cases which factually require the same legal conclusion. *Ohio Casualty Insurance Company* v. *Smith*, 297 F. 2d 265 (7th Cir. 1962); *Gettins* v. *United States Life Insurance Company*, 221 F. 2d 782 (6th Cir. 1955). When there are such state decisions the federal court is not free to exercise its independent judgment and apply a different rule even though it may think the state Supreme Court may establish a different rule in some future litigation. *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 85 L. Ed. 139 (1940); *Gettins* v. *United States Life Insurance Company, supra; Milan* v. *Kausch*, 194 F. 2d 263 (6th Cir. 1952).

The majority of the Court below has completely ignored its aforesaid obligations and by refusing to follow the applicable Michigan decisions has committed serious error not in keeping with accepted standards of jurisprudence.

There is and was no dispute as to the actions of the plaintiff just prior to and at the time of his fall into the pit. These actions are well summed up in the dissenting opinion of Judge Miller in the court below. He said:

". . . In the present case the plaintiff knew the grease pit was there. He stood beside it for ten or fifteen minutes. His vision was normal; and irrespective of whether the light was bright or 'dim,' he testified that he saw the pit and that he knew he was walking beside it. The width of the walkway between the pits was a little over 6 feet, affording plenty of room to avoid the pit. He testified that he started to walk down the center of it. If he veered substantially to the right so as to bring him to the edge of the pit with the resulting accident, it was his own voluntary action, heedless of his own safety. With the known danger of the open pit on his right, it was clearly his duty to watch where he was walking. Obviously, he did not do so. He did not claim that he slipped on a wet, icy, or greasy walkway. He testified, 'as we got to the corner here, I just landed in the pit at the bottom. I don't know what happened'." (App. A, *infra*, P. 16a, 17a).

In the Court of Appeals all three judges agreed that under Michigan cases cited by defendant, plaintiff was guilty of contributory negligence as a matter of law. Those cases are in point with the instant case and stand for the proposition that where a person is possessed of his natural facilities (as was plaintiff here) he will be charged with negligence if injured because of his failure to heed his surroundings (as did plaintiff here).

Both the majority and the dissenting opinions draw this rule from two different cases cited by defendant. In its opinion the majority states:

"A more serious problem is presented by defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law. Defendant cites and relies upon *Neal* v. *Cities Service Oil Co.*, 306 Mich., 605 (1943), in which the plaintiff fell through a trap-door opening in the floor of a service-station rest room.

In holding that the plaintiff was guilty of contributory negligence, the Supreme Court said, page 610:

> 'We hold that when an adult possessed of all normal faculties walks into a small, well-lighted room, past such a floor opening as herein described, stands for five minutes near the edge of the opening, and then in a moment of carelessness steps backward into the opening, such person is not using the care that an ordinarily careful person would use in like circumstances. Plaintiff was guilty of negligence as a matter of law.'" (App. A, *infra*, P. 13a).

Chief Judge Miller in his dissent says,

> "It was stated in *Elliott* v. *Dahl*, *supra*, 299 Mich. 380, 382, 'This court is definitely committed to the holding that one going about in public places or semipublic places when possessed of his natural faculties may not escape being charged with negligence if he is heedless of his own safety. If he fails to use the care that an ordinarily careful person would have used in like surroundings, and in consequence sustains injury, he must bear his own misfortune.'" (App. A, *infra*, P. 17a).

However, two of the three judges below departed from the clearly defined Michigan law, and referring "to more recent decisions of the Supreme Court of Michigan" affirmed the lower court's submission of the question of contributory negligence to the jury. But these "recent decisions" are wholly and completely inapplicable to the fact situation in this case. Some are automobile cases. (*McKinney* v. *Yelavich*, 352 Mich. 687, 90 N.W. 2d 883 (1958); *Shaw* v. *Bashore*, 353 Mich. 31, 90 N.W. 2d 688 (1958); and *DeLuca* v. *Wonnacott*, 358 Mich. 319, 100 N.W. 2d 288 (1960). Others are cases in which the plaintiffs fell because of unknown and unseen hazards. (*Budman*

v. *Skore*, 363 Mich. 458, 109 N.W. 2d 791 (1961); *Normand* v. *Thomas Theatre Corporation*, 349 Mich. 50, 84 N.W. 2d 451 (1957); and *Engel* v. *Smith*, 82 Mich. 1, 46 N.W. 21 (1890)). *Ackerberg* v. *Muskegon Osteopathic Hospital*, 366 Mich. 596, 115 N.W. 2d 290 (1962) involves the very special situation of an emotionally upset plaintiff who fell off a platform adjoining a hospital emergency room.

Perhaps the best statement of the error committed by the Court of Appeals is in Chief Judge Miller's dissent:

> "The majority opinion, however, expressed the view that recent decisions of the Supreme Court of Michigan require that the issue of plaintiff's contributory negligence under the facts of this case be submitted to the jury. I recognize that they have probably liberalized the rule on such an issue in favor of a plaintiff. But, accepting the rulings in those cases as being the present Michigan law on this subject, I believe the factual situation in the present case is so materially different from what was before the court in those cases, as to cause us to adhere to the rulings in the earlier Michigan cases above referred to, rather than to submit the issue to the jury." (App. A. *infra*, P. 16a).

3. Under Michigan Law Defendant Was Not Negligent In Failing to Protect and Adequately Light the Grease Pit.

On facts similar to those in the case at bar, the Supreme Court of Michigan has decided there was no question of adequacy of lighting for the jury to consider and hence no negligence. In *Boyle* v. *Preketes*, 262 Mich. 629, 247 N.W. 763 (1933) plaintiff claimed the lighting was inadequate and that as a result she fell down a stairway which she did not see. But she testified that her eyesight was good, that she saw defendant's merchandise supply, and

that she could see a distance of thirty feet or more and locate other customers. There was other evidence of lights in the store. The court said that her testimony showed there was adequate light and held as a matter of law:

> "There is no credible testimony that defendants were guilty of negligence in failing to properly light their place of business" (P. 635)

Plaintiff in the instant case not only testified that his eyesight was normal (App. 77a), that he saw things in and functions taking place in the garage prior to the accident (App. 73a, 74a, 79a-81a), that he saw ice on a car parked on the pit and the ice melting and running to the floor (App. 79a), that he saw ice and water on the floor (App. 74a, 80a), but also that he saw the pit (App. 80a-82a) and "this little ridge around the pit" (App. 81a). In addition there was evidence of lights in the service garage and in the pit itself (App. 50a, 54a, 99a, 100a).

Plaintiff's testimony is much stronger than that of plaintiff in *Boyle* v. *Preketes, supra,* as to his ability to see and discern his surroundings. While Mrs. Boyle claimed she did not see the stairway down which she fell, plaintiff, here, admitted seeing the pit. The Court of Appeals in holding that the question of adequacy of lighting was properly submitted to the jury, has failed to follow the law of Michigan as announced in *Boyle* v. *Preketes, supra.*

Larned v. *Vanderlinde,* 165 Mich. 464, 131 N.W. 465 (1911), governs the question of protective devices. There, where plaintiff fell down a stairway in defendant's store while being led to the rear by a clerk, the court held there was no negligence in failing to guard the stairway which was in plain sight. Accord, *Boyle* v. *Preketes, supra.*

In holding that defendant in the instant case had a duty to protect a clearly visible grease pit, the Court of Appeals has once again failed to follow the "last word" of the Michigan Supreme Court.

On the basis of these cases the Court of Appeals should have ruled as did the Supreme Judicial Court of Massachusetts in *Flynn* v. *Cities Service Refining Co.*, 306 Mass. 302, 28 N.E. 2nd 453, (1940). In that case plaintiff was a little girl who fell into a grease pit while with her father who was a customer in the service station. The court held,

> "The evidence did not warrant a finding that the pit was not an ordinary accessory of the gasoline station, the existence of which on the premises was naturally to be expected . . . or that the danger of falling into it was not 'obvious to any ordinarily intelligent person'. There was no evidence that the pit was concealed or at the time the accident occurred —in the morning—any lighting of the pit was required to disclose its presence . . . It could not have been found that the defendant owed any duty to the father of the plaintiff to maintain a fence or rail or other barrier around the pit to guard against the danger of falling into it, obvious to any ordinarily intelligent person." (pp. 303, 304)

The decision as to protective devices has far-reaching, important results. For if this decision is to remain and be construed as the law of Michigan, which it is not, none of the thousands of service station owners will be safe from negligence claims unless they effectively barricade their many thousands of grease pits, so as to make falling into them impossible, even in broad daylight. This is not only a great economic burden, but will render such pits so cumbersome to operate that they will be unusable. This is a drastic curtailment of a station owner's facilities and is in conflict with all existing law.

4. Inadequate Lighting Was Not the Proximate Cause of Plaintiff's Injuries.

Plaintiff failed to prove that the alleged failure of defendant to adequately light the grease pit was the proximate cause of his fall. The majority of the Court of Appeals overlooked this important point and, relying principally on the case of *Grover* v. *Simons*, 342 Mich. 480, 70 N.W. 2d 775 (1955), held that the question of lighting was for the jury. But, in that case, the plaintiff contended that he did not discover an opening because the light was dim and the court said, at page 487,

> "If the light was dim, . . . such fact may have *contributed* to his *failure to discover* the opening." (Emphasis Added)

Hence, in that case, a dim condition could have been the proximate cause of the accident. However, in this case, plaintiff, although he said it was "kind of dim" (App. 80a), admitted that he saw the pit and the rim around it, that he knew it was there and that he did not know what happened, except that he fell.

As Chief Judge Miller said in his dissenting opinion,

> "His vision was normal and irrespective of whether the light was bright or 'dim', he testified that he saw the pit and that he knew he was walking beside it." (App. A, *infra*, P. 16a).

Thus, the effect of the majority's silence on the question of proximate cause is to condone the trial court submitting to the jury the question of whether or not "kind of dim" lighting (a vague term at best) was the proximate cause of the plaintiff's fall into a pit which plaintiff saw and under circumstances where he himself did not know what happened. We respectfully suggest

that the Court of Appeals in failing to consider this question and in failing to hold for the defendant thereon has departed from the accepted and usual course of judicial proceedings.

CONCLUSION.

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

BURTON Y. WEITZENFELD
Attorney for Petitioner.

LOUIS A. LEHR, JR.
LLOYD S. KUPFERBERG
of Counsel.

APPENDIX A.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 14689

RICHARD F. GUGEL, SR.,
Plaintiff-Appellee,
v.
SEARS, ROEBUCK & COMPANY,
a New York Corporation,
Defendant-Appellant.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided August 31, 1962.

Before: MILLER, Chief Judge, WEICK, Circuit Judge, and STARR, Senior District Judge.

STARR, Senior District Judge. The plaintiff-appellee began this action in the circuit court of Saginaw County, Michigan, to recover damages resulting from his personal injuries sustained when he fell into an open grease pit in defendant-appellant's service garage, maintained in connection with its retail store in the city of Saginaw. The action was removed to the Federal court on the basis of diversity of citizenship and jurisdictional amount involved. It was tried to a jury, which returned a verdict for plaintiff in the amount of $7,850, upon which judgment was entered. Defendant-appellant appeals, contending that the district court erred in denying its motion for a directed verdict and submitting to the jury the questions of its negligence and plaintiff-appellee's contributory negligence,

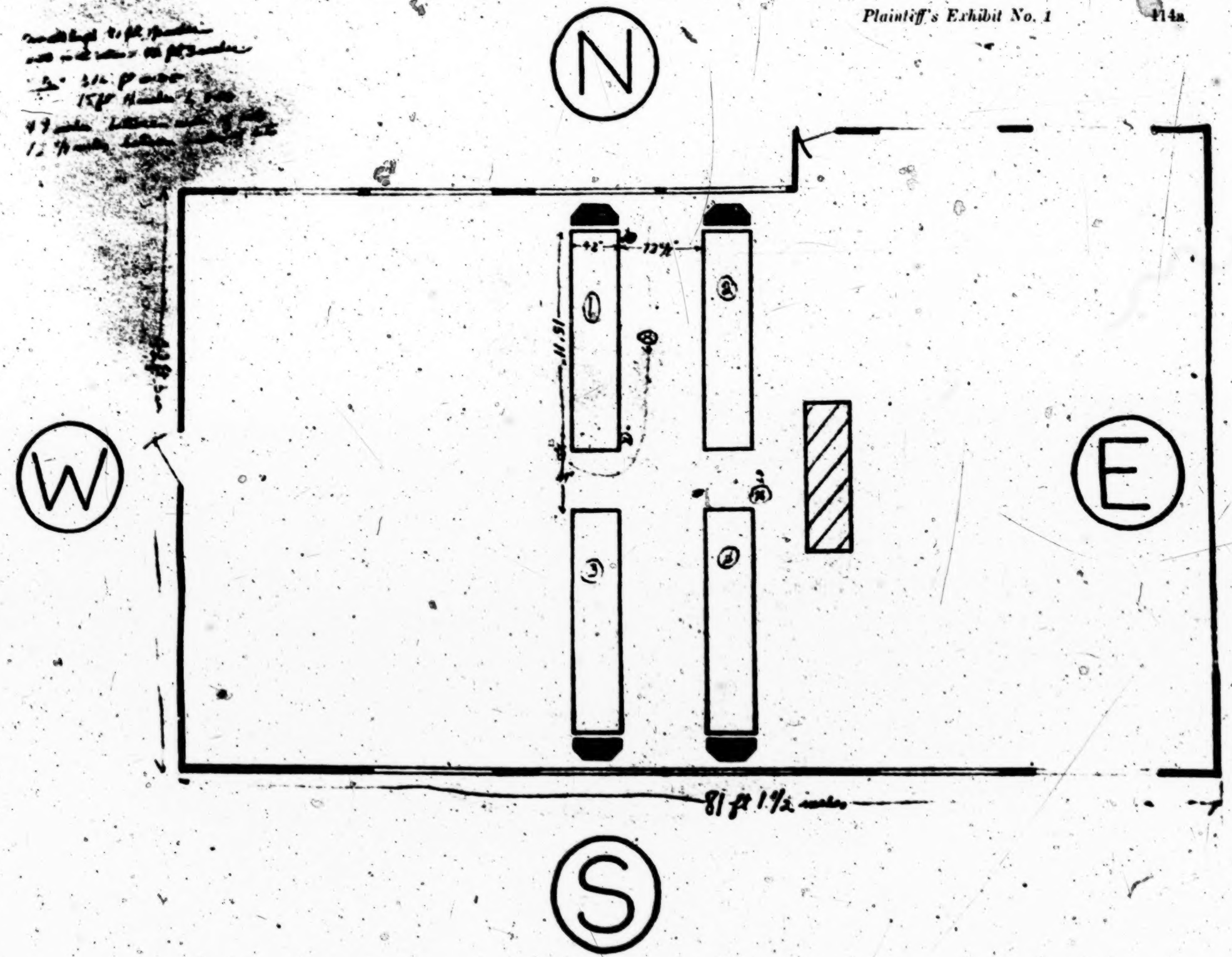
and also erred in denying its motion for judgment notwithstanding the verdict. The parties will hereinafter be referred to as plaintiff and defendant.

The facts relating to this accident may briefly be stated as follows: On January 24, 1959, at about 1:30 in the afternoon the plaintiff went to defendant's retail store in Saginaw to purchase a television set, parking his car on the street beside the store. When he returned to his car, he was unable to start it because the battery was dead. He then went to defendant's service garage adjoining its store to obtain help in starting it.

There were four open grease pits for the lubrication of cars, located in about the center of the service garage, arranged and spaced as shown in plaintiff's exhibit 1 attached hereto. Each of the pits was about 6 feet deep, 15 feet and 11 inches long, and 42 inches wide, and around the edge of each pit was a steel rim painted red, extending about 4 inches above the surface of the floor. The areaway or distance between the sides of pits 1 and 2 and between the sides of pits 3 and 4 was 72⅝ inches, and the distance between the ends of pits 1 and 3 and the ends of pits 2 and 4 was 49 inches. The service garage was about 81 feet long, 42 feet wide, and 12 feet high, and was lighted by 15 to 20 300-watt light bulbs hanging about 6 inches below the ceiling. Each of the grease pits was lighted from within by several 150-watt light bulbs. When plaintiff entered the service garage, there were cars over all four grease pits.

He explained his car trouble to the defendant's auto-accessories manager, Mr. Buckingham, and was advised that as soon as a mechanic, James Dorr, finished working on the car over pit 1, he would assist plaintiff in starting his car. Plaintiff followed Mr. Buckingham between the ends of pits 1 and 3 and then to the north between pits 1 and 2 to about the front of the car over pit 1, where he was introduced to Dorr, and arrangements were made for Dorr to assist him. Plaintiff stood beside pit 1 for 10 or 15 minutes, during which time he talked with the owner of the car being serviced in that pit. Then, with mechanic

Plaintiff's Exhibit No. 1 114a



Dorr leading him, he walked south between pits 1 and 2, and just before he reached the end of pit 1, he fell into it and was injured.

Plaintiff claims that the defendant was negligent, *first*, in failing to keep the service garage adequately lighted; *second*, in failing to keep the grease pits properly guarded by the use of chains, guard rails or other protective device; and *third*, in the failure of defendant's employee to lead him along a safe course or path while traveling through the service garage.

At the close of plaintiff's proofs, and again at the close of all proofs, the defendant moved for a directed verdict in its favor on the ground that plaintiff had failed to prove negligence on its part, and on the ground that plaintiff was guilty of contributory negligence as a matter of law. The trial court took these motions under advisement and submitted the case to the jury, which returned a verdict for plaintiff of $7,850. The defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. In its brief defendant states that it withdraws its motion for a new trial.

We must examine the testimony and determine whether the trial court erred in submitting to the jury the questions of fact as to defendant's negligence and plaintiff's contributory negligence. Plaintiff was 55 years old and testified that although he had had cataract operations on both eyes, his vision with glasses was normal. He further testified as follows:

"Q. Now, did you see any car occupying these four pits drive away from the pit?

"A. Yes, from pit No. 1. . . .

"Q. . . . After car No. 1, occupying pit No. 1, left, what happened?

"A. Well, after Mr. Dorr closed the (garage) door, he says, 'Come on, Mr. Gugel, I will now see if I can get your car started.' So he proceeded to lead the way and I followed him. . . . We were standing about here.

"Q. For the record, you are showing a point equi-

distant between the two pits, Nos. 1 and 2; at their most northerly point?

"A. That's right. I was probably standing a little bit farther towards the middle of the car than up here. We proceeded south to where a walk goes towards the west. . . .

"Q. . . . Were you together?

"A. He was ahead of me. . . . Three or four feet. . . . I was following him, and as we got to the corner here, I just landed in the pit at the bottom. I don't know what happened.

"Q. . . . Could you describe to the jury the condition of the floor area between these two pits, 1 and 2, that you and he (Dorr) were walking south on?

"A. It was wet—they were wet, with ice and water that was on the floor.

"Q. How would you describe the lighting generally, that is, how was it lighted there?

"A. Well, I would say it was dim."

Plaintiff further testified on cross examination:

"Q. Now, you, at that time, saw this pit there?

"A. Yes.

"Q. And you saw this raised little rim around it?

"A. Well, it was kind of dim in there, and the floor was wet, and everything was camouflaged there. . . .

"Q. And do you know about how close you were walking to the edge of the pit?

"A. Oh, I would say about the center of the aisle. . . .

"Q. . . . You, of course, realized there was a pit over here and pit No. 2 also?

"A. Yes, and there was a car on it.

"Q. Yes. But you knew that there was a pit there, and, of course, you knew that there was a car over pit No. 3?

"A. Yes.

"Q. You had seen that when you walked in, I assume?

"A. Yes.

"Q. And you had plenty of room to get by the end of this car, did you not, as you walked in with Mr. Buckingham?

"A. Yes, we got through all right.

"Q. You didn't scrape up against the car, did you?

"A. Well, I don't recall.

"Q. But then you proceeded to walk south and then you were about in the middle there, the middle of this areaway between the two pits, pits 1 and 2?

"A. . . . Yes, in the center, walking towards the south. . . . In the center of the area between 1 and 2. . . .

"Q. And the next thing you knew you were falling in the pit?

"A. That's right. . . . I don't know what happened. I know my feet were involved in it, and I went down into the pit.

A mechanic employed by defendant testified regarding lighting in the service garage as follows:

"Q. . . . How is the garage lighted, Mr. Kwaiser?

"A. By single bulbs in the ceiling.

"Q. And do you know what the size, wattage of those bulbs were at that time?

"A. Yes. . . . 300 watts. . . .

"Q. Now, what is your best estimate as to how many of them there were?

"A. Fifteen to twenty.

"Q. Now, these pits that are open, do they have any lights in them?

"A. Yes, they do. . . .

"Q. . . . What do you say to the amount of light that the ceiling lights provided for this garage space? Was it bright or dim or how?

"A. I would say it was sufficient.

"Q. Well, by 'sufficient,' what do you mean? Sufficient for what?

"A. For working on automobiles. . . .

"Q. . . . But was it sufficient so that you could lift up the hood of an automobile and work on a battery without any . . . other aid?

"A. Yes.

"Q. And could you discern objects from one end of the building to the other end?

"A. Yes."

James Dorr, the mechanic who was directed to assist plaintiff in starting his car, testified regarding the accident as follows:

"Q. . . . When did you see him (plaintiff) and where was it?

"A. It was on the west end of the pits, your pit area. Mr. Buckingham, which is our auto accessories manager, brought him over and introduced him to me, or he introduced the fact that he needed some assistance with his car, needed to have the battery jumped so he could get it into the service station. Trouble starting the car. . . .

"I said, 'If you will follow me, I will go out and try to get your car started for you.' . . .

"We proceeded going south here, towards the south end of the building, down through, in between the two pits, 1 and 2, and made a right hand turn going over to the open area where we keep the batteries so I could get the jump cable to get him started.

"Q. That would be, for the record, a west direction?

"A. Turned right, to go west.

"Q. . . . What did you see or hear that you can tell the jury with reference to the accident?

"A. When I got across this island over to the open space, I looked back over my shoulder to see if Mr. Gugel was following me. . . . And at the time I looked back is when I saw him start to fall. . . . And it looked to me when he was falling he was trying to break his fall by grabbing hold of the western side of pit No. 1. . . .

"Q. . . . Now, then, the space between the southerly end of pit No. 1, where Mr. Gugel fell in, and the north edge of pit No. 3 is partly occupied by the front of that Ford is it not? . . .

"Witness, could you, as closely as you can, tell the jury approximately . . . how many inches there was, in space, between the end of pit No. 1—that would be the south end—and the front of the bumper of the '57 Ford sitting on pit No. 3? . . .

"A. I would say approximately three feet."

Plaintiff's witness John LaDronka, a customer of the defendant, whose car was being serviced over pit 4 in the defendant's garage, testified in part:

"Q. . . . As closely as you can recall, when you first saw Mr. Gugel, can you tell us where you were standing?

"A. . . . I was standing northeast corner of pit No. 4, facing west. . . .

"Q. . . . What was he doing at that time?

"A. Oh, he was standing talking to some guy. . . .

"Q. . . . Did you or Mr. Gugel move from those positions?

"A. Well, Mr. Gugel did, but I stayed right at the same spot.

"Q. . . . Could you tell us what you saw Mr. Gugel do? . . .

"A. . . . As I stood here, looking west towards the store, my car was on pit No. 4 being serviced. . . . I could see Mr. Gugel. . . . As the attendant opened the door for this car on No. 1 pit to proceed out of the garage, the way I saw it, the attendant came back down between pit No. 1 and No. 2 in a southerly direction, and as the attendant turned west to head towards the store, Mr. Gugel was . . . following him. In the process, at the instant the car proceeded to move forward off of the pit, as Mr. Gugel came around this corner of—that would be the southeast corner of pit No. 1, and Mr. Gugel appeared to me, as he came around the corner of the . . . rear fender of the car, appeared to stick his hand out, and at that instant the car was moving away, and, of course, that is when I saw him stub his right toe on the corner of the pit, and fall at an angle into the pit. . . .

"Q. There is no question you saw Mr. Gugel trip his right foot up against this rail, guard rail or flange?
"A. That is right, sir."

As the accident involved in this case occurred in Michigan, the rights and liabilities of the parties must be determined under the law of that State. Plaintiff first claims that the defendant was negligent in failing to keep its service garage adequately lighted and that its negligence was the proximate cause of plaintiff's injuries. Plaintiff testified that at the time of the accident the floor between pits 1 and 2 was wet with ice and water; that the light in the garage was dim and that everything was camouflaged. One of defendant's mechanics testified that the light in the garage was sufficient for working on automobiles and that objects could be discerned from one end of the building to the other.

Webster's New International Dictionary (2d ed., unabridged) defines "dim" as "not bright or distinct; wanting luminosity or clearness, darkish; . . . not clearly visible; indistinct."

In *Grover* v. *Simons*, 342 Mich. 480 (1955), the plaintiff's decedent fractured his leg when he fell through an open trap door in the floor of the rest room in defendant's restaurant. Witnesses for plaintiff testified that the light in the rest room was dim. The defendant claimed that the rest room was brightly lighted. The jury returned a verdict for plaintiff, and the trial court granted defendant's motion for judgment notwithstanding the verdict. In reversing the trial court and reinstating the verdict for the plaintiff, the Supreme Court of Michigan said, pages 485, 486:

"There was thus a direct conflict in the testimony. The matter of lighting conditions was obviously important as bearing on the alleged negligence of defendant, and, also, on the claimed contributory negligence of Mr. Phippard (decedent). The issue was one for determination by the jury, which evidently resolved it in favor of plaintiff's claims."

In *Saddler* v. *Bethel Markets, Inc.*, 3 Cir., 267 F.2d 805, the plaintiff described the parking-lot area in which she fell as "dim." The plaintiff obtained a verdict, and the district court granted defendant's motion for judgment notwithstanding the verdict. In reversing the district court the appellate court said, page 807:

> "It was for the jury to consider whether this dimness, the in between condition described by the witness as being neither light nor dark, constituted inadequate illumination."

In *Falen* v. *Monessen Amusement Co.*, 363 Pa. 168, 69 A. 2d 65, the plaintiff was injured when in the evening she fell in the defendant's theater parking lot. She alleged that the defendant was negligent in not adequately lighting the lot. In affirming a judgment for the plaintiff the Supreme Court of Pennsylvania said:

> "Between light and darkness there are varying degrees or shades of light whereunder a question of contributory negligence, because of a failure to see distinctly, necessarily becomes a matter for a jury to determine."

Other authorities holding that the question of whether or not premises are adequately lighted is a question for jury determination are: *Wilson* v. *Holland*, 96 Ga. App. 679, 101 S.E. 2d 97; *Acme Markets* v. *Romschel*, 181 Va. 171, 24 S.E. 2d 430, 434; *Paepcke* v. *Sears, Roebuck & Co.*, 263 Wis. 290, 57 N.W. 2d 352, 355. See also *Matt Skoney Packard Co.* v. *Canino, Colo.*, 350 P. 2d 1069.

It may be noted that in the recent case of *Schulte and Bruns* v. *Great Lakes Stevedoring Corporation* (decided April 5, 1962), 6 Cir., ... F. 2d ..., the Court of Appeals for this circuit said:

> "the general rule is that if any substantial evidence supports a claim the issue is for a jury. This is the rule in the Sixth Circuit. *Scott* v. *United States*, 161 F. 2d 1009, 1012 (Judge Martin), and cases cited. It seems that in recent years the authority of a trial judge

to direct a verdict has been narrowed. See *Pennsylvania R.R.* v. *Goldie*, 182 F. 2d 9 (Judge Simons)."

In the present case the conflicting testimony of plaintiff and the defendant's mechanic certainly presented a question of fact as to whether defendant's service garage was adequately lighted, and under the recent decision of the Supreme Court of Michigan in *Glover* v. *Simons*, *supra*, and other authorities cited, that question of fact was properly submitted to the jury for determination. There was testimony from which the jury could have determined that the defendant's service garage was not adequately lighted and that, therefore, it was guilty of negligence.

The plaintiff also claims that the defendant was negligent in failing to keep the grease pit in its service garage properly guarded by the use of chains, guard rails or other protective device. At the time of the accident there was a steel rim painted red around the edge of each pit extending about four inches above the surface of the floor. There was testimony that prior to the accident the defendant had maintained a protective chain arrangement around each of the grease pits, the chains being attached to metal posts about three feet in height located in the corners of the pits, but that the chains had been removed and were not around the pits at the time of the accident. There was also testimony that defendant had replaced the protective chains around the pits subsequent to the accident. There was no showing that the defendant was required by State statute or by city ordinance to guard the pits by the use of chains or other protective device. However, we are convinced that the testimony presented a question of fact for jury determination as to whether the defendant was negligent in not maintaining some type of barricade or protective device around the pits higher than the four-inch steel rim at the time of plaintiff's accident.

In the very recent case of *Ackerberg* v. *Muskegon Osteopathic Hospital*, 366 Mich. 597 (decided May 18, 1962), the plaintiff sued the hospital for personal injuries sustained when he fell from an emergency-entrance platform. The plaintiff claimed that his injuries resulted from the negli-

gence of the defendant hospital in failing to construct a guard railing, chain or other form of protection on the platform. The case was tried to a jury, and at the conclusion of the plaintiff's proofs the trial judge granted defendant's motion for a directed verdict in its favor on the ground that the plaintiff was guilty of contributory negligence as a matter of law. In reversing and remanding the case for a new trial, the Supreme Court of Michigan held that the questions of defendant's negligence and plaintiff's contributory negligence should have been submitted to the jury for determination. The court said at pages 601, 602:

> "The test, then, in the instant case is, would all reasonable men agree as to whether or not defendant hospital had a duty to construct a guard or protection around the rear platform which was used by the general public entering and leaving the emergency entrance of the hospital. . . .
>
> "We do not decide in this case that plaintiff is entitled to recovery, but merely that there is a question of fact as to defendant's negligence which should be submitted to a jury. . . .
>
> "Reasonable men might differ as to whether plaintiff, under the circumstances, was guilty of contributory negligence in failing to observe the platform was without protection.
>
> "We conclude, therefore, under the circumstances in this case, that the court erred in granting the motion for directed verdict."

In its opinion in the foregoing *Ackerberg* case the Supreme Court quoted with approval from *Grand Trunk Railway Co.* v. *Ives*, 144 U. S. 408, 417, as follows:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

See also *Hayes* v. *Richfield Oil Corp.*, 38 Cal. 2d 345, 240 P. 2d 580; *Kelly* v. *Goldberg*, Mass., 192 N. E. 513; *Davis* v. *Wade Motor Sales*, 100 N. H. 12, 117 A. 2d 924.

Plaintiff further contends that the defendant was negligent in that its employee Door failed to lead him along a safe route or path while traveling through the service garage. Plaintiff presented no testimony showing that there was any absolutely safe route through the garage, or any route that would have been safer than that along which he was led. In the absence of proof that there was a safer route or path over which plaintiff could have been led, there was no question of fact for jury consideration.

A more serious problem is presented by defendant's contention that the plaintiff was guilty of contributory negligence as a matter of law. Defendant cites and relies upon *Neal* v. *Cities Service Co.*, 306 Mich. 605 (1943), in which the plaintiff fell through a trap-door opening in the floor of a service-station rest room. In holding that the plaintiff was guilty of contributory negligence, the Supreme Court said, page 610:

> "We hold that when an adult possessed of all normal faculties walks into a small, well-lighted room, past such a floor opening as herein described, stands for five minutes near the edge of the opening, and then in a moment of carelessness steps backward into the opening, such person is not using the care that an ordinarily careful person would use in like circumstances. Plaintiff was guilty of negligence as a matter of law."

In further support of its contention that plaintiff in the present case was guilty of negligence as a matter of law, defendant cites *Elliott* v. *Dahl*, 299 Mich. 380 (1941); *Blankertz* v. *Mack & Co.*, 263 Mich. 527 (1933); *Evans* v. *Orttenburger*, 242 Mich. 57 (1928); *Larned* v. *Vanderlinde*, 165 Mich. 464 (1911). It can be argued that under these earlier decisions of the Supreme Court of Michigan the plaintiff in the present action could be held to be guilty

of contributory negligence as a matter of law, which would bar his recovery in this action.

However, it should be noted that in more recent decisions the Supreme Court of Michigan has held that where there is any question or doubt as to plaintiff's contributory negligence, the question should be submitted to a jury for determination. In *Normand* v. *Thomas Theatre Corporation*, 349 Mich. 50 (1957), the plaintiff fell down an unlighted stairway while groping in the dark for a light switch and was injured. The Supreme Court said, page 56:

> "When it can be affirmed that all reasonable men would agree as to the quality of an act in respect of its being either negligent or prudent, the court may give effect to such consensus of opinion, and direct a verdict in accordance therewith. . . . If there is doubt as to whether all reasonable men would draw the same conclusion from the evidence, then the question must be submitted to the 12 reasonable men appointed by the constitution to determine disputed or doubtful questions of fact."

In *McKinney* v. *Yelavich*, 352 Mich. 687, 692 (1958), the Supreme Court said:

> "Only under the most extreme circumstances, those, in fact, where reasonable minds could not differ upon the facts, or the inferences to be drawn therefrom, can the case be taken from the jury. If honest differences of opinion between men of average intelligence might exist, the issue should not be resolved by the court alone."

In *Shaw* v. *Bashore*, 353 Mich. 31, 40 (1958), the Supreme Court said:

> "We seek to serve notice that we ourselves take an unfavorable view of this developing new doctrine of 'unfavorable view.' We also seek to smite this growing tendency to take cases away from juries on capricious and arbitrary grounds."

In *DeLuca* v. *Wonnacott*, 358 Mich. 319, 324, 325 (1960), the court said:

> "One of the things this Court has latterly been at some pains to achieve is to restore litigants to their jury day in our courts, and not allow that day to be cut off peremptorily except when there is no reasonable issue for the jury to pass on."

In *Budman* v. *Skore*, 363 Mich. 458, 462 (1961), the court said:

> "We have repeatedly held that on a motion for directed verdict the evidence must be viewed in the light most favorable to the party opposing the motion and that to justify the taking of a case from the jury the evidence must be such as to preclude any reasonable view establishing plaintiff's claim for the right to recovery."

See also *Ackerberg* v. *Muskegon Osteopathic Hospital*, *supra*, 366 Mich. 597.

In further support of his contention that the question of his contributory negligence was properly submitted to the jury, the plaintiff cites *Firestone Tire & Rubber Co.* v. *Arrington*, 5 Cir., 197 F. 2d 699; *McDonald* v. *F. W. Woolworth Co.*, 4 Cir., 177 F. 2d 401; *Engel* v. *Smith*, 82 Mich. 1; *Philips* v. *Sun-Best Fruit Distributors*, Cal. App. 324 P. 2d 948; *Hayes* v. *Richfield Oil Corp.*, 38 Cal. 2d 345, 240 P. 2d 580; *Purdon* v. *Cohen*, Fla. App. 1961, 126 So. 2d 575; *Kelley* v. *Goldberg*, Mass., 192 N. E. 513.

We are convinced that under the more recent decisions of the Supreme Court of Michigan hereinbefore cited and discussed, the question of plaintiff's contributory negligence in the present action was properly submitted to the jury for its determination. Having returned a verdict for plaintiff, the jury obviously found that he was not guilty of contributory negligence.

We conclude that the district court did not err in submitting to the jury the question of whether or not the

defendant was guilty of negligence, which was the proximate cause of plaintiff's injuries, and did not err in submitting to the jury the question of whether or not plaintiff was guilty of contributory negligence. For the reasons herein stated we affirm the judgment for the plaintiff.

MILLER, Chief Judge, dissenting. As stated in the majority opinion, the plaintiff in this action, under the following decisions of the Supreme Court of Michigan, would be guilty of contributory negligence as a matter of law, which would bar his recovery. *Larned* v. *Vanderlinde*, 165 Mich. 464; *Evans* v. *Ortlenburger*, 242 Mich. 57; *Blankertz* v. *Mack & Co.*, 263 Mich. 527; *Elliott* v. *Dahl*, 299 Mich. 380.

The majority opinion, however, expresses the view that recent decisions of the Supreme Court of Michigan require that the issue of plaintiff's contributory negligence under the facts of this case be submitted to the jury. I recognize that they have probably liberalized the rule on such an issue in favor of a plaintiff. But, accepting the rulings in those cases as being the present Michigan law on the subject, I believe the factual situation in the present case is so materially different from what was before the Court in those cases as to cause us to adhere to the rulings in the earlier Michigan cases above referred to, rather than to submit the issue to the jury. Several of the cases cited involve automobile accidents involving moving vehicles, which I think present a materially different factual situation from that in the present case. *Normand* v. *Thomas Theatre Corp.*, 349 Mich. 50, where the plaintiff fell down an unlighted stairway while groping in the dark for a light-switch, is factually similar, but differs in the most important fact that the plaintiff did not know of the existence of the stairs down which she fell. In the present case the plaintiff knew the grease pit was there. He stood beside it for ten or fifteen minutes. His vision was normal, and irrespective of whether the light was bright or "dim," he testified that he saw the pit and that he knew he was walking

beside it. The width of the walkway between the pits was a little over 6 feet, affording plenty of room to avoid the pit. He testified that he started to walk down the center of it. If he veered substantially to the right so as to bring him to the edge of the pit with the resulting accident, it was his own voluntary action, heedless of his own safety. With the known danger of the open pit on his right, it was clearly his duty to watch where he was walking. Obviously, he did not do so. He did not claim that he slipped on a wet, icy, or greasy walkway. He testified, "as we got to the corner here, I just landed in the pit at the bottom. I don't know what happened."

It was stated in *Elliott* v. *Dahl, supra,* 299 Mich. 380, 382, "This court is definitely committed to the holding that one going about in public places or semipublic places when possessed of his natural faculties may not escape being charged with negligence if he is heedless of his own safety. If he fails to use the care that an ordinarily careful person would have used in like surroundings, and in consequence sustains injury, he must bear his own misfortune."

I am of the opinion that the judgment should be reversed.

APPENDIX B.

JUDGMENT
(Filed August 31, 1962)

Appeal from the United States District Court for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:
/s/ Raymond W. Starr
Senior District Judge
(Sitting by Designation)

APPENDIX C.

ORDER DENYING REHEARING
(Filed Nov. 2, 1962)

Before: Miller and Weick,
Circuit Judges, and
Starr, Senior District Judge.

Upon consideration of the defendant-appellant's petition for rehearing, It Is Ordered that said petition be denied.

Judge Miller is of the opinion that the petition for rehearing should be sustained.

Approved for entry:

/s/ Raymond W. Starr
Senior District Judge

No. ------

IN THE

SUPREME COURT OF THE UNITED STATES

SEARS, ROEBUCK AND CO.,
A New York corporation,
Petitioner,

v.

RICHARD F. GUGEL, SR.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PETER F. CICINELLI,
EUGENE D. MOSSNER,
913 No. Michigan Avenue,
Saginaw, Michigan.

IRVING M. HART,
111 So. Fayette Street,
Saginaw, Michigan.
Attorneys for Respondent.

NOEL N. DONLEY,
206½ So. Michigan Avenue,
Big Rapids, Michigan.
Of Counsel for Respondent.

AMERICAN BRIEF AND RECORD COMPANY, FIFTY MARKET AVENUE N.W.
GRAND RAPIDS 2, MICHIGAN — PHONE GL 8-5326

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STATEMENT OF THE CASE

(NOTE: References in this section, unless otherwise indicated, are to the original Appendix).

It is an elementary principle that upon a Motion to Dismiss a cause of action, the facts of a case should be viewed in the light most favorable to the plaintiff. These facts in this case are as follows:

Plaintiff is a fifty-five year old man who was injured when he was caused to fall into an open, unguarded grease pit in defendant's service garage.

On January 24, 1959, about 1:30 in the afternoon, the plaintiff went to the defendant's store in downtown Saginaw, Michigan, to purchase a television set (69a, 70a). The day was stormy, snowy and blizzardy (24a, 70a). The plaintiff had parked his car on Janes Street in back of defendant's store, and when he returned to his car, after purchasing the television set, he found that he was unable to start his car, because the battery was dead (70a, 71a).

Plaintiff returned to defendant's store, with the intention of calling a wrecker, but while he was in the store, he decided to see if he could get someone in defendant's service garage, which was attached to defendant's store, to start his car for him (71a).

The defendant owned and operated a service garage in connection with its retail store, inside of which they greased and lubricated cars, made automobile repairs, etc. (6a, 11a).

Located inside of defendant's service garage at the time were four (4) open grease pits, each 15 feet 11 inches long, and 42 inches wide (19a). Around the edge of each pit was a one-quarter inch steel rim, which extended four inches above the surface of the floor (32a, 54a).

The defendant, prior to the day of the accident, had used waist high (36a) guarding chains fastened to steel poles around the edges of these open pits, but for some unexplained reason, they were not present on the day that plaintiff visited the service garage (36a-38a; 102a-104a).

Prior to January 24, 1959, plaintiff had visited the premises of the service garage only three times in three years (68a-69a), but had never been in the area of the grease pits before that day (69a).

At the time plaintiff entered, cars covered all four of the pits (73a).

The light inside the service garage was *dim* and things on the floor were camouflaged (74a, 80a).

Plaintiff had to wait several minutes before one of the service garage attendants could help him. During this time, he stood between the cars which were over Pits No. 1 and No. 2, and he visited briefly with a man whose car was being serviced (72a, 73a, 79a). When the attendant finished servicing the car over Pit No. 1, he asked the plaintiff to follow him so he could attend to his car, which plaintiff proceeded to do (41a, 59a, 73a, 74a).

It was agreed by virtually all the witnesses that the service garage floor, around the pits, was covered with water and slush and snow (38a, 39a, 46a, 80a-81a). The distance between pits No. 1 and No. 3 was about 4 feet, but an automobile on pit No. 3 narrowed the walking distance between the pits to about 3 feet (64a).

As plaintiff was following the attendant around the southeast corner of pit No. 1 (see Plaintiff's Exhibit No.

1, 114a), plaintiff stubbed his toe on the edge of the four inch raised rim around the outside edge of the pit and fell down into the open pit, severely injuring his back (86a, 92a).

The jury found in plaintiff's favor and awarded him the sum of $7,850.00.

After the trial Court denied defendant's Motion for Judgment Notwithstanding the Verdict and/or a New Trial, defendant took an appeal to the United States Court of Appeals for the Sixth Circuit, claiming (1) that defendant had not been guilty of any negligence, and (2) that plaintiff was guilty of contributory negligence as a matter of law.

The Court of Appeals in a two-one decision affirmed the District Court, holding that the issues of negligence and contributory negligence were properly left to jury determination (see *Gugel vs. Sears, Roebuck & Co.*, 308 F. 2d 131).

The defendant then filed a Petition for a Rehearing in the Court of Appeals, which Petition was denied on November 2, 1962.

Defendant now has filed a Petition for a Writ of Certiorari in this Court.

ARGUMENT IN OPPOSITION TO ALLOWANCE OF WRIT

(NOTE: References in this section are to the Appendix accompanying the Petition for Writ of Certiorari).

The complaint made by the Petitioner in this case is that the Court of Appeals for the Sixth Circuit failed to follow the law of the State of Michigan and ignored its own prior decisions in deciding that in this personal injury case the issues of negligence and contributory negligence were properly left for jury determination.

It is extremely difficult to understand how anyone could read recent decisions of the Supreme Court of Michigan and come to the conclusion that the District Judge and the Court of Appeals are all wrong and that the Petitioner is correct.

In Michigan it has been clearly pronounced law in recent years that the issues of defendant's negligence and of plaintiff's contributory negligence in a personal injury case *shall be left to the jury for determination.* The majority opinion of the Court of Appeals points this out quite clearly in its Opinion (14a-15a), citing cases from 1957 to date.

The respondent sees little point in reviewing all of the decisions cited. The principle running through all of these cases is clear and that is this:

> "If there is a doubt as to whether *all reasonable men* would draw the same conclusion from the evidence, then the question must be submitted to the twelve reasonable men appointed by the Constitution to determine disputed or doubtful questions of fact."
>
> (*Normand vs. Thomas Theatre Corp.*, 349 Mich. 50, 84 N.W. 2d 451 (1957)).

The Petitioner here (defendant in the lower Court) relied on four Michigan cases of early vintage — none of them since 1941. The Court of Appeals referring to those cases stated that while it *might be argued* that under those early decisions the plaintiff *might* be held to be guilty of negligence as a matter of law, the Supreme Court of Michigan had in recent years held that *any doubtful case should be submitted to the triers of the facts* (13a-14a).

Actually, the more recent Michigan cases relied upon by the District Court and the Court of Appeals only reiterated what was already said by the Supreme Court of Michigan in 1890 in the case of *Engel vs. Smith*, 82 Mich. 1, 46 N.W. 21, which, incidentally, is similar to the instant case, insofar as the facts are concerned.

In the *Engel* case, plaintiff brought suit to recover for injuries sustained when he fell through a trap door in the floor of defendant's store.

According to the report at page 5:

> "The negligence charged is that the defendants *failed to properly guard the hatchway while it was open*, or to warn the plaintiff of the danger."

Plaintiff had a verdict and defendant appealed, contending that the maintenance of the trap door was not negligence and that even if it was, plaintiff was guilty of contributory negligence as a matter of law, since he was well aware of the opening, yet nevertheless fell into it.

With regard to the negligence, the Court said at page 5:

> "Trap doors, elevator shafts and *similar openings in* floors have long been a usual and necessary part of the appliances of business in most warehouses, manufactories and other business buildings * * * *but they are dangerous openings* * * * The fact of their dangerous character *makes it the duty of those maintaining them to properly guard them when they are open.*"

On the question of plaintiff's contributory negligence, the Court said this at pages 6 and 7:

> "The question of plaintiff's contributory negligence is one of more difficulty. He knew as much about the location of the trap door as did the defendants. He knew that it was customary for defendants to use it at that time of day. * * * He did not think, upon opening the door, to stop and examine to see whether the trap door was open before stepping in. Any thought on his part at the moment would have prevented the accident, and the question is a very close one as to whether the duty on his part of taking care was as great under the circumstances as was the duty of the defendants. * * * As we have said, the question is one of some difficulty and is not free from doubt. *We have held that in such cases the facts should be submitted to the jury.*"

Defendant in the instant case claimed that the plaintiff was negligent as a matter of law, since the pits were open and obvious and plaintiff knew that they were there.

The *Engel* case is ample authority for the proposition that *knowledge of an open hole in the floor will not necessarily preclude recovery.*

The majority opinion of the Court of Appeals agreed that the *Engel vs. Smith* case was in point, as were other

Michigan cases and cases from jurisdictions such as California, Massachusetts, and Florida.

The Petitioner claims, quite wrongly, on page 8 of his Brief in support of his Petition that the *Budman vs. Skore* case, 363 Mich. 458, 109 N.W. 2d 791 (1961) is distinguishable since it was a case in which plaintiff fell "because of unknown and unseen hazards." On the contrary, in the *Budman* case, plaintiff sued for injuries as the result of slipping on a greasy puddle of water in defendant's store. Plaintiff had been a patron of defendant's store for about 1½ years before the date of the accident. On the day in question, she parked behind defendant's store and used the rear entrance which she had done on other occasions previously. The door led into a storage room. According to the report, when plaintiff came into the back door:

> "*She noticed a puddle of water on the floor.* • • • She stepped through the puddle and *noticed that it was greasy underneath.*"

On her return trip she again "stepped into the puddle" of greasy water and slipped, injuring her ankle. There was a directed verdict for the defendant. Upon appeal the lower Court was reversed and the case was remanded back for a new trial. Mr. Justice Kelly who wrote the unanimous Opinion of the Michigan Supreme Court said on page 462 of the report as follows:

> "We have repeatedly held that on a motion for directed verdict the evidence must be viewed in the light most favorable to the party opposing the motion and that *to justify the taking of a case from the jury, the evidence must be such as to preclude any reasonable view establishing plaintiff's claim for the right to recover.*"

IT IS PLAIN, THEN, THAT THE COURT OF APPEALS DID NOT IGNORE MICHIGAN PRECEDENT IN DECIDING THIS CASE. THE COURT METICULOUSLY FOLLOWED THE UNMISTAKABLY CLEAR PRONOUNCEMENTS OF THE SUPREME COURT OF MICHIGAN ON THE QUESTIONS OF NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE.

As to the charge that the Court of Appeals ignored its own previous Decisions, this is equally without merit. The Petitioner in his Brief has cited no Sixth Circuit case, or indeed, any other Federal Court case, which is contrary to the majority ruling in this case.

The Court of Appeals on the other hand cited Fourth Circuit and Fifth Circuit Opinions in support of its conclusions (15a), and further quoted from an Opinion of the United States Supreme Court on this same question. The case was that of *Grand Trunk Railway Co. vs. Ives*, 144 U. S. 408, where it was said at page 417:

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, *the determination of the matter is for the jury.*"

The chief argument made by the Petitioner (defendant in the lower Court) was that plaintiff had been guilty of contributory negligence as a matter of law. In taking this position, the defendant would have us believe that contributory negligence is the slightest departure from perfection. To put it another way, the defendant argues that if plaintiff is negligent one-half of one per cent, and he is ninety-nine and one-half per cent perfect, he is, nevertheless, negligent and is himself responsible for the accident as a matter of law. That, of course, is not true.

Contributory negligence is a departure from the conduct of the ordinarily prudent person, and the ordinarily prudent person is a C-grade (average) individual. He is the 75% intelligence man and such people have a right to a number of frailties of life, a number of losses of memory, and a number of errancies and misconceptions. *The ordinarily prudent person is not a perfect person. Contributory negligence then is a departure from what is normal, not a departure from perfection.*

It was well said in *Kilpatrick vs. Grand Trunk Railway Co.*, 52 A. 531 (Vt.-1902):

> "The law required of him (plaintiff) the prudence of a prudent man, and such a man is not one who never forgets anything, is never guilty of any inat-

tention, and never fails to think of any possible danger to which he is exposed since this would require the perfect or infallible man. * * *"

CONCLUSION

Plaintiff below charged that the defendant was negligent in failing to adequately light the garage. The Court of Appeals held that this was a question of fact for jury determination, citing a number of Michigan cases and cases from other jurisdictions (9a-10a). Likewise, the Court said it was for the jury to decide whether or not defendant should have had a guardrail, chain or other protective device around the grease pit as they had at one time (11a-12a).

On the issue of contributory negligence, the Court of Appeals adhered to the latest pronouncements of the Supreme Court of Michigan to the effect that such an issue should be likewise determined by the jury (14a-16a).

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

PETER F. CICINELLI,
EUGENE D. MOSSNER,
913 No. Michigan Avenue,
Saginaw, Michigan.

IRVING M. HART,
111 So. Fayette Street,
Saginaw, Michigan.
Attorneys for Respondent.

NUEL N. DONLEY,
206½ So. Michigan Avenue,
Big Rapids, Michigan.
Of Counsel for Respondent.